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Mat Shuhaimi bin Shafiei v Kerajaan Malaysia

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-115–04 OF 2015
LIM YEE LAN, VARGHESE GEORGE AND HARMINDAR SINGH JJCA
25 NOVEMBER 2016

C

Constitutional Law — Legislation — Constitutionality — Appellant challenged the constitutionality of s 3(3) of the Sedition Act 1948 as against art 10(1)(a) of the Federal Constitution — Whether appellant precluded by doctrine of res judicata from declaration sought in present application — Whether restriction imposed by s 3(3) of the Act could pass test of proportionality — Federal Constitution arts 8 & 10 — Sedition Act 1948 ss 3 & 4

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This was an appeal against the decision of the High Court in dismissing the appellant's application vide a 'Saman Pemula' for a declaration that s 3 of the Sedition Act 1948 ('the Act'), read together with s 4 of the Act was in violation of or inconsistent to a citizen's right to freedom of speech and expression as enshrined in art 10(1)(a) of the Federal Constitution ('the Constitution'). The trial judge dismissed the application on the ground that the application was an abuse of the court process as the issue in the present case had already been resolved by the Court of Appeal in the appellant's earlier criminal application. The trial judge further stated that the attempts by the appellant in the present case was to reopen a settled issue hence the court in its inherent jurisdiction was entitled to invoke the principle of res judicata to dismiss the appellant's action. Nevertheless, the learned trial judge did not deal with the substantive contentions raised by the appellant as to the constitutionality of s 3(3) of the Act. Aggrieved with the trial judge's decision, the appellant brought the present appeal. The issues for determination were: (a) whether the appellant was precluded by the doctrine of res judicata from the declaration sought in the present application; and (b) whether the 'restriction' imposed by s 3(3) of the Act could pass the test of proportionality to be held as sustainable within the permissible restrictions or legislative measures allowed for in art 10(2)(a) of the Constitution.

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Held, allowing the appeal and setting aside the decision of the learned High Court judge with no order as to costs:

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(1) The learned trial judge was clearly in error when stating that an 'identical question' had been considered and decided upon by the courts. Based on various authorities, it was clear that s 3(3) of the Act had not hitherto before specifically been the subject of a constitutional challenge in any of

those previous proceedings, that was, on similar lines as mounted in the originating summons here by the appellant. This was conceded in as much by learned senior federal counsel. This issue ought to have been considered on its merit; the trial court's failure to do so had no doubt, resulted in a miscarriage of justice which warranted appellate intervention (see paras 18 & 23).

(2) What was being directed by s 3(3) of the Act was a total removal of any consideration on the issue of intention ie mens rea which was an essential ingredient in other criminal proceedings. The said provision also was not in terms of a rebuttable presumption. Thus, s 3(3) of the Act was a disproportionate restriction or measure to meet the permissible objectives spelt out in art 10(2)(a) of the Constitution. Further, s 3(3) was also in violation of the constitutional rights of a citizen to be treated and protected equally before the law as provided under art 8(1) of the Constitution. The court further made a declaration that s 3(3) of the Act contravened art 10 of the Constitution and therefore was invalid and of no effect in law (sees paras 35–36, 40, 43 & 45).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu melalui saman pemula bagi satu deklarasi bahawa s 3 Akta Hasutan 1948 ('Akta'), dibaca bersama-sama dengan s 4 Akta, adalah satu pelanggaran atau tidak selaras dengan hak bersuara rakyat yang termaktub dalam perkara 10(1)(a) Perlembagaan Persekutuan ('Perlembagaan'). Hakim bicara menolak permohonan atas alasan bahawa permohonan adalah salah guna proses mahkamah kerana isu dalam kes ini telah diselesaikan oleh Mahkamah Rayuan dalam permohonan jenayah perayu yang terdahulu. Hakim bicara seterusnya menyatakan bahawa percubaan-percubaan oleh perayu dalam kes ini adalah untuk membuka semua isu yang telah selesai maka mahkamah dalam bidang kuasa semula jadinya berhak membangkitkan prinsip res judicata untuk menolak tindakan perayu. Walau bagaimanapun, hakim bicara tidak menangani hujah-hujah substantif yang dibangkitkan oleh perayu tentang keperlembagaan s 3(3) Akta. Terkilan dengan keputusan hakim bicara, perayu memulakan rayuan ini. Isu-isu yang perlu diputuskan adalah: (a) sama ada perayu terkecuali daripada doktrin res judicata daripada pengisytiharan yang dipohon dalam permohonan ini; dan (b) sama ada 'sekatan' oleh s 3(3) Akta boleh lulus ujian keseimbangan yang diputuskan mampan dalam sekatan atau langkah-langkah yang dibenarkan dalam perkara 10(2) Perlembagaan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan hakim Mahkamah Tinggi tanpa perintah terhadap kos:

(1) Hakim bicara jelas terkhilaf apabila beliau menyatakan bahawa soalan serupa telah dipertimbangkan dan diputuskan oleh

mahkamah-mahkamah. Berdasarkan pelbagai nas, jelas bahawa s 3(3) Akta tidak, sehingga kini, dikhususkan menjadi subjek cabaran Perlembagaan dalam mana-mana prosiding terdahulu, iaitu alasan serupa yang dikemukakan dalam sama pemula oleh perayu. Ini diakui oleh peguam persekutuan kanan. Isu ini seharusnya dipertimbangkan berdasarkan merit; kegagalan mahkamah bicara berbuat demikian tidak syak lagi telah mengakibatkan kegagalan undang-undang yang mewajarkan campur tangan rayuan (lihat perenggan 18 & 23).

(2) Apa yang diperuntukkan oleh s 3(3) Akta adalah penyingkiran penuh apa-apa balasan berdasarkan isu niat iaitu mens rea yang merupakan inti pati penting dalam prosiding jenayah lain. Peruntukan tersebut juga bukan anggapan yang boleh disangkal. Oleh itu, s 3(3) Akta adalah sekatan atau langkah tidak seimbang untuk memenuhi objektif-objektif yang dinyatakan dalam perkara 10(2)(a) Perlembagaan. Selanjutnya, s 3(3) juga melanggar hak-hak perlembagaan rakyat untuk mendapat perlindungan sama rata di bawah undang-undang seperti yang diperuntukkan di bawah s 8(1) Perlembagaan. Mahkamah seterusnya membuat pengisytiharan bahawa s 3(3) Akta melanggar perkara 10 Perlembagaan dan oleh itu tidak sah dan tidak mempunyai kesan undang-undang (lihat perenggan 35–36, 40, 43 & 45).]

Notes

For cases on constitutionality, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2980–2983.

Cases referred to

Arnold and others v National Westminster Bank Plc [1991] 2 AC 93, HL (refd)
Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2) [1965] 1 All ER 300, CA (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)
Mat Shuhaimi bin Shafiei v PP [2014] 2 MLJ 145; [2014] 5 CLJ 22, CA (refd)
Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19, CA (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921, FC (refd)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
PP v Param Cumaraswamy [1986] 1 MLJ 512 (refd)
Siow Chung Peng v PP [2014] 4 MLJ 504, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37
Federal Constitution arts 8, 8(1), 10, 10(1)(a), (2), (2)(a), (4), Part II

Malaysian Anti-Corruption Commission Act 2009 s 50
Penal Code s 505
Sedition Act 1948 ss 3, 3(1), (2), (3), 4, 4(1), (1)(a), (1)(c)

Appeal from: Originating Summons No 24–36–09 of 2014 (High Court, Kuala Lumpur)

N Surendran (Latheefa Koya, Shahid Adli bin Kamarudin and Raul Lee Baskaran with him) (Daim & Gamany) for the appellant.
Alice Loke Yee Ching (Shaiful Nizam bin Shahri with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Varghese George JCA:

[1] The appeal before us was against the dismissal by the High Court at Kuala Lumpur on 23 February 2015 of the appellant's *saman pemula* application for a declaration that s 3 of the Sedition Act 1948 ('Act 15') read together with s 4 of the same Act 15, was in violation of or inconsistent *(bercanggah dengan)* to a citizen's right to freedom of speech and expression as enshrined in art 10(1)(a) of the Federal Constitution ('the FC').

[2] The *saman pemula* filed on 15 September 2014 however had a history and context. The appellant had earlier been charged on 7 February 2011 at the Sessions Court Shah Alam under s 4(1)(c) of Act 15 for publishing an article online captioned 'Pandangan saya berasaskan Undang-Undang Tubuh Kerajaan Negeri Selangor, 1959'. At the time of the publication, the appellant was the ADUN for the State Seat of Sri Muda.

[3] The appellant had claimed trial to that charge. However before commencement of the trial there, the appellant had by a notice of motion dated 1 August 2011 filed in Shah Alam High Court (Criminal Application No 44–72 of 2011) sought for certain orders, inter alia, for the charge against him to be struck off on the grounds that s 4 of Act 15 was inconsistent with art 10 of the FC.

[4] On 19 January 2012 the High Court at Shah Alam had dismissed that motion. The appellant's appeal to the Court of Appeal against that decision was in turn also dismissed on 26 December 2013.

[5] The appellant had thereafter sought to appeal to the Federal Court but the leave application was subsequently withdrawn in the light of the decision of the apex court in *Siow Chung Peng v Public Prosecutor* [2014] 4 MLJ 504, which had held that Federal Court had no jurisdiction to entertain any further appeal that arose in relation to a criminal case filed in the sessions court.

[6] The party named by the appellant in the criminal application and the related appeals was the *public prosecutor (pendakwa raya),* as the initiator of the charges brought against the appellant.

AT THE HIGH COURT

[7] The defendant in the *saman pemula*, from which this appeal arose, was however the *Government of Malaysia*. The *saman pemula* was disposed by the learned judge based on affidavits filed in court and upon submissions of counsel for the respective parties. It needs to be pointed out here that there was no attempt by the respondent to strike out the *saman pemula* at the High Court.

[8] The respondent in resisting the appellant's move to obtain the declaration argued that this application was a blatant abuse by the appellant of the process of court having already failed in the criminal application proceedings on the issue of the constitutionality of s 4 of Act 15 itself. It was submitted that this was an attempt to relitigate the very same issue which had been conclusively decided upon by the Court of Appeal in the appellant's criminal application. The court, it was urged, ought not to therefore entertain such a collateral attack on a final decision and in any event, such attempt brought in instalments was caught by the doctrine of res judicata.

[9] To be fair to the appellant, the thrust of this *saman pemula* was however directed more particularly as to the unconstitutionality of s 3(3) of Act 15 as found on the statute-book. It was argued that the exclusion by that provision of 'intention' having to be proved when a person was charged with the commission of an offence under Act 15, was an unreasonable and disproportionate inroad into one's fundamental rights although art 10(2)(a) of the FC allowed for the existence of such laws as were necessary or expedient to preserve the security of the nation or public order generally. Section 3(3) of Act 15 is reproduced here:

> (3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

[10] It was contended that in criminal law mens rea or proof of 'intention' behind the impugned act, had always been an essential element that had to be established on evidence to constitute culpability and a punishable crime. In that light, the rendering of such 'intention' to be irrelevant by s 3(3) of Act 15,

it was argued, had to be held to be a restriction which breached the 'principles of proportionality', even to meet the permissible objectives of such laws validated under art 10(2)(a) of the FC.

[11] It was argued that s 3(3) read together with s 4 of Act 15 should be declared to be inconsistent to the equality provisions of the FC; alternatively, that s 3(3) should be read down in such manner as to be compliant with the guaranteed freedom and such reasonable restrictions allowed under art 10.

[12] The learned judge in dismissing the appellant's *saman pemula* for a declaration took the simplistic position that the application was an abuse of the court process, in that, it was scandalous and vexatious since it amounted to another attempt to reopen the constitutionality issue surrounding s 4 of Act 15, that had already been resolved by the Court of Appeal in the appellant's earlier criminal application. The attempts here, according to the learned judge, was to reopen a settled issue and hence the court in exercise of its inherent jurisdiction was entitled to invoke the principle of res judicata to dismiss the appellant's action.

[13] The court appeared to have been persuaded that the appellant's application for the declaration '... relied on the same factual matrix to premise his case ...' and/or that an 'identical question' had already been decided by a competent court. The learned judge did not, in any event, deal with the substantive contentions raised by the appellant as to the constitutionality of s 3(3) of Act 15.

BEFORE US

[14] The submissions of counsel for the appellant and of learned senior federal counsel ('learned SFC') for the respondent were essentially on similar lines as had been canvassed at the High Court. Further details of their respective submissions are addressed in our discussion below on the identified issues that arose for consideration in this appeal.

OUR DELIBERATION

[15] It was our view that this appeal was best approached under the following broad heads or questions, namely:

(a) whether the appellant was precluded by the doctrine of res judicata from the declaration sought in this *saman pemula*;

(b) what was the position in law in respect of the test of 'proportionality' with reference to the legislative restrictions that might be imposed to meet the objectives of art 10(2) of the FC; and

(c) what was the legal effect of s 3(3) of Act 15 as presently worded and found in the statute book.

[16] Articles 8 and 10 of the FC, in so far as was pertinent to contextualise the principle of equality and equal protection by the law and the permissible extent that Parliament was allowed by law to derogate from the citizen's fundamental right to freedom of speech and expression, are set out below:

Article 8 — Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) ...

(3) ...

(4) ...

(5) ...

Article 10 — Freedom of speech, assembly and association

(1) Subject to Clauses (2), (3) and (4) —

(a) every citizen has the right to freedom of speech and expression;

(b) ...

(c) ...

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(b) ...

(c) ...

(3) ...

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153, or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

A RES JUDICATA ISSUE

[17] It was trite that the doctrine of res judicata is not an inflexible rule; a court could still decline to apply it where to do so would lead to an unjust result. The doctrine, whether in its narrow or broader sense, has its roots in B equity and hence retained its discretionary nature, namely to work justice and not injustice. It was still open to the courts to recognise that in special circumstances an inflexible application of that doctrine or of any estoppel may have the opposite result. It was '... merely equity in action in the procedural arena' to quote Gopal Sri Ram JCA (as His Lordship then was) in *Chee Pok* C *Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321. That judgment went on to also state:

> Now, there is a dimension to the doctrine of res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead D to an unjust result. And there is respectable authority in support of the view I have just expressed.

(See also *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1965] 1 All ER 300; *Arnold and others v National Westminster Bank Plc* [1991] 2 AC E 93).

[18] From a perusal of the various authorities referred to us it was clear that s 3(3) of Act 15 had not hitherto before specifically been the subject of a constitutional challenge in any of those previous proceedings, that is, on F similar lines as mounted in the *saman pemula* here by the appellant. This was conceded in as much by learned SFC. The criminal application questioned the validity of s 4(1)(c) of Act 15 on the grounds that it unfairly restricted a person's right to freedom of speech and expression. There was in the judgment of the Court of Appeal in the criminal application (*Mat Shuhaimi bin Shafiei v Public* G *Prosecutor* [2014] 2 MLJ 145; [2014] 5 CLJ 22), a comment with regard to the relevance of the 'proportionality test' but this was merely in general terms and with reference to the purpose of Act 15 and the permissible laws for the maintenance of public order as allowed under art 10(2) of the FC.

H **[19]** Even the Federal Court in its recent decision in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921, while accepting the proportionality principle/test (as expounded in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] I 3 CLJ 507) as an important criteria in determining what would amount to a 'reasonable restriction' under art 10(2)(a) of the FC, only confined the court's consideration of whether s 4(1) of Act 15 fell within the ambit or parameter of art 10(2)(a); s 3(3) did not feature at all in the finding there which, essentially, was that Act 15 (a Pre-Merdeka law) was valid and enforceable.

[20] The learned SFC referred us to the decisions of the court in *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 and *Public Prosecutor v Param Cumaraswamy* [1986] 1 MLJ 512 in support of the submission that s 3(3) of Act 15 had been previously considered by our courts and any issue as to its validity had been put to rest. It was argued that in effect that subsection had been upheld to be valid to relieve the prosecution from the burden of proving intention of an accused facing a charge under s 4 of Act 15.

[21] It is pertinent to however note that both those decisions, apart from being of the High Court, were given in the context of criminal charges brought against the respective accused unlike here where a declaration was being sought in the *saman pemula*. Further and more importantly, there was no discussion or any assessment by the courts there as to the constitutionality of s 3(3) of Act 15 on the basis of reasonableness or the 'proportionality principle' in the context of art 10(2) of the FC. To be fair to the learned judges there, Their Lordships were not called upon to consider that question at all. Both the decisions did not consider the validity of s 3(3) of Act 15 from the constitutional angle but only merely applied s 3(3) and the 'irrelevancy of intention' as therein permitted as meaning that mens rea was not required to be considered in any prosecution brought under s 4 of Act 15.

[22] We could not therefore agree with learned SFC that the previous decisions cited above (including the Court of Appeal decision in the previous criminal application of the appellant) had settled the issue that s 3(3) of Act 15 did not offend the principle of 'proportionality' when the scope of permissible restrictions to meet the objectives identified in art 10(2)(a) of the FC was called into question.

[23] The learned judge was, in our respectful view, also clearly in error when stating that an 'identical question' had been considered and decided upon by the courts. That was not so. What was before the court by way of the *saman pemula* was a substantive challenge separately brought on the constitutional validity of s 3(3) of Act 15 which ought to have been considered on its merit; the court's failure to do so had no doubt, resulted in a miscarriage of justice which warranted our intervention.

[24] It was our view that the appellant ought not to be summarily shut out of this novel constitutional challenge now mounted which principally focussed on the validity in law of s 3(3) of Act 15 as tested against the principle of 'proportionality' of any restriction availed of under art 10(2)(a) of the FC; the specifics of which had never been adjudicated upon previously. In any event, it was in the interest of justice, not merely to the appellant, but also to the public at large, that this issue now been canvassed be heard and determined by the courts.

A PRINCIPLE/TEST OF PROPORTIONALITY

[25] There was no longer any room for disputing that the jurisprudence related to operation of fundamental liberties guaranteed under Part II of the FC had now evolved to a stage to recognise that any legislation or any provision of law to be maintained as valid or sustainable, apart from the already accepted criteria of 'reasonable or rational classification' and that such law did not 'render the liberty to be ineffective and merely illusory', had to also meet the test of proportionality. This was particularly so where the fundamental liberty/right under the FC was not absolute but qualified, as in the case of liberties guaranteed to citizens under art 10 of the FC. The Federal Court in the case of *Public Prosecutor v Azmi bin Sharom* expressly endorsed that the proportionality test was now an entrenched part of our law drawn from the equality clause housed in art 8(1) of the FC. The Federal Court acknowledged this test as a further check against infringement of fundamental rights guaranteed under the FC as seminally laid out by the Court of Appeal in their decisions in *Dr Mohd Nasir bin Hashim*'s case and *Sivarasa Rasiah*'s case.

[26] The following excerpts from the judgment of Arifin Zakaria CJ in *Azmi bin Sharom*'s case are illuminative of the development and current state of the law on this issue:

> [32] However, since the Court of Appeal's decision in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19, the court had imposed a further restriction on the law touching on the fundamental rights guaranteed by the Constitution by applying the 'reasonable' and 'proportionality' tests in determining whether the impugned law is consistent with the Constitution.
>
> [33] In that case, Gopal Sri Ram JCA (as he then was) at pp 229–220 (MLJ); pp 28–29 (CLJ) stated:
>
> > The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all forms of State action. See, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771. It must also bear in mind the principle of substantive proportionality that art 8(1) imports. See, *Om Kumar v Union of India AIR* [2000] SC 3689. This doctrine was most recently applied by this court in the judgment of my learned brother Mohd Ghazali in *Menara Panglobal Sdn Bhd v Ariokianathan* [2006] 3 MLJ 493; [2006] 2 CLJ 501. *In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus'.* See, *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165. A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.
>
> [34] The two tests were later affirmed by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507. At p 340 (MLJ); pp 515, 522, 525–527 (CLJ), et seq, Gopal Sri Ram FCJ state as follows:

> [5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose ... (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in *Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors* [1992] 1 MLJ 343; [1992] 3 CLJ Rep 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

and at:

> [42] The proportionality principle/test was explained by the Court of Appeal in *Dr Mohd Nasir Hashim* in the passage we earlier quoted at para 33. In short, the learned judge said that the *legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved*. (Emphasis added.)

[27] Article 10 of the FC (in so far as was relevant for our purposes), has been reproduced earlier in this judgment. No doubt Parliament was allowed by law to derogate from the citizen's fundamental liberties as to the freedom of speech and expression, for the objectives and to the extent permitted only as provided for in cl (2)(a), namely:

> ... such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

and further as allowed in cl (4) of that Article. The decision of the Federal Court in *Azmi Shahrom*'s case was to the extent only that s 4 of Act 15 had met the test of proportionality (vis a vis the objective to be met) and was constitutional.

[28] Given that to be the state of the law as at present, the appellant, in our assessment, was therefore clearly entitled to also have s 3(3) of Act 15 subjected to the scrutiny of the courts as to whether that provision by itself within the overall reach of Act 15, was objectively fair and or a proportionate measure to

meet the ends that were permitted under art 10(2)(a) of the FC.

[29] The question specifically was then whether the 'restriction' imposed by s 3(3) of Act 15, that is, 'the intention of the person charged at the time he did ... shall be deemed to be irrelevant if in fact the act ... if done ... had a seditious tendency' could pass that test of proportionality to be held as sustainable within the permissible restrictions or legislative measures allowed for in cl (2)(a) of art 10 of the FC.

SECTION 3(3) ACT 15

[30] Section 3(3) of Act 15 is once again reproduced here:

> (3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

[31] Sections 3(1), 3(2) and s 4(1) of Act 15 which were also relevant for our consideration are set out below:

> 3(1) A 'seditious tendency' is a tendency —
>
> (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
>
> (b) to excite the subjects of any Ruler of the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;
>
> (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;
>
> (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
>
> (e) to promote feelings of ill will and hostility between different races or classes of the population of Malaysia; or
>
> (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

(2) Notwithstanding anything in subsection (1) an act, apeech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency —

(a) ...

(b) ...

(c) ...

Offences

4(1) Any person who —

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency;

(b) utters any seditious words;

(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or

(d) imports any seditious publication,

shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years; and any seditious publication found in the possession of the person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs.

('seditious' in respect of any act, speech, words or publication has been defined as '... one having a seditious tendency').

[32] It bears reminding ourselves that art 8 of the FC enjoins that all persons (inclusive of citizens of course) ought to be treated equally by the law and that they were further entitled to the equal protection of the law, meaning both substantive and procedural law. The obvious purport of s 3(3) of Act 15 was to create another regime in respect of prosecution of offences under Act 15, by rendering irrelevant the requirement that intention be proved (apart from the act with seditious tendency being proved) for a conviction to be entered. This exclusion was irrefutably a deviation from the norm in so far as criminal prosecutions were concerned and made peculiarly applicable only to a person who was being charged for an offence under Act 15.

[33] The learned SFC submitted that this departure from the norm fell within a 'restriction' contemplated within art 10(2)(a) and was justified to meet the objectives sanctioned there namely '... in the interest of the security of the Federation ... public order ... or to be provided against ... contempt of court, defamation, or incitement to any offence'. The first question that bothered us was whether the purport of s 3(3) was a mere 'restriction', when, as it would

appear, the purport of s 3(3) was somewhat couched in absolute and conclusive term to render judicial determination of intention (mens rea) to be totally irrelevant in convicting an accused for an offence under s 4 of Act 15.

[34] Counsel for the appellant's submission, on the other hand, essentially was that the total removal of proof of intention as being necessary to be proved in any prosecution under Act 15, was a disproportionate measure to meet the purposes for which 'restrictions' were permitted under that cl 2 of art 10. Objectively assessed, it was argued, that s 3(3) of Act 15 was an overkill, akin to using 'a hammer to confront the menace of a mosquito'. It was submitted that what would only properly qualify to be upheld under the permissible scope of art 10(2) of the FC, should be the least restrictive of a choice of available measures. Any restriction as was not more than necessary to meet the identified ends there, it was argued, ought to be struck down as being unconstitutional.

[35] We found merits in the appellant's contention. Obviously what was being directed by s 3(3) of Act 15, as presently worded, was a total displacement or removal of any consideration or necessary finding on the issue of intention of the accused underlying such impugned act; on the other hand mens rea was an essential ingredient to be proved in other criminal proceedings before a valid conviction was handed down.

[36] It is also pertinent to observe here that s 3(3) of Act 15 was also not in the terms of a 'rebuttable presumption' as was provided for in other statutes where the burden of proof of certain aspects of evidence, including intention in some situations, was shifted out of the prosecution's domain and placed squarely on the accused particularly in cases involving serious crimes. For an example, in the Dangerous Drugs Act 1952, the relevant provision there (s 37) provided for various presumptions as may be necessary to be invoked but was worded in the following terms — '... shall be presumed, until the contrary is proved ...'. A similar formulation (*presumed … unless the contrary is proved*) was also found in s 50 *(Presumption in Certain Offences)* in the Malaysian Anti-Corruption Commission Act 2009. Such formulation allowed for a presumption to be invoked in respect of certain matters that need to be proved by the prosecution but on the same score the accused was not denied the opportunity to rebut that presumption on credible evidence to be adduced by the accused for evaluation and conclusions to be drawn by the courts.

[37] Although the wording in s 3(3) of Act 15 was expressed in terms that intention of the person charged '... *shall be deemed* to be irrelevant ...' in proving the commission of any offence under that statute, the irrefutable effect of that provision, in our assessment, was not to create a presumption which the accused could disprove. More significantly apart from seeking to totally relieve the prosecution of the burden to prove intention (as had been held previously

by the courts in *Public Prosecutor v Ooi Kee Saik & Ors* and *Public Prosecutor v Param Cumaraswamy* that provision also had the effect of putting the issue of the accused's intention beyond judicial consideration; such would not have been the drastic effect if such restriction was couched as a rebuttable presumption.

[38] Learned SFC's contention was that the legislative intent underlying the offences under Act 15 was that they were to be 'strict liability offences' and such were not prohibited in law. Alternatively, it was submitted that s 3(3) of Act 15 was in any event superfluous or redundant since if the impugned act or statement was shown to be bearing a 'seditious tendency' (as defined in s 3(1) of Act 15 read subject to s 3(2) in any event), then it would still constitute an offence under s 4(1)(a) of that statute, that is, notwithstanding any unsustainability of s 3(3) of Act 15 in law.

[39] We were of the view that '*seditious tendency*' as defined in s 3(1) of Act 15 would still require an objective determination by the court based on facts and circumstances in each case. Thus an offence under s 4 of Act 15 could by no means be considered a 'strict liability' offence in the sense argued by the learned SFC. If it was intended to be a 'strict liability' offence, then there would not have been any need for the Legislature to include s 3(3) itself in Act 15 in the first place.

[40] Although limited legislative inroad *(restriction)* was permitted to meet the objectives spelt out under art 10(2)(a) of the FC, we were of the considered view, that s 3(3) of Act 15 did not meet the test of proportionality required in imposing such measures or restrictions to, amongst others, for the preservation of the interest of the security of the nation, or of public order, or even to prevent the incitement of an offence. There was no valid basis or justification for a 'strict liability' offence considering that even in the cases of more socially abhorrent and heinous crimes involving drug abuse or drug trafficking under the Dangerous Drugs Act 1952, or for that matter, for corruption under the Malaysian Anti-Corruption Commission Act 2009, the law only created a 'rebuttable presumption' to assist the prosecution in securing a conviction by shifting the burden to the accused to disprove intent or of any material fact in issue in that criminal prosecution. Section 3(3) of Act 15 in as much as it sought to totally displace proof of intent for offences under Act 15 was wholly unsustainable and a breach of the guarantee of equality before the law under the FC accorded to all persons in the country.

[41] It was also apposite at this point to mention that the attempt by s 3(3) of Act 15 to displace proof of intent in determination of commission of an offence under Act 15 would also appear to be in conflict with provisions of s 505 of the Penal Code where, in somewhat similar circumstances obtaining

(almost identical to the objectives to be met in art 10(2)(a) of the FC), *intent* had clearly to be an essential ingredient to be proved in any prosecution if commenced under the Penal Code. Section 505 of the Penal Code was as follows:

> 505 Statements conducing to public mischief.
>
> Whoever makes, publishes or circulates any statement, rumour or report —
>
> (a) *with intent* to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Malaysian Armed Forces or any person to whom section 140B refers, to mutiny or otherwise disregard or fail in his duty as such;
>
> (b) *with intent* to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; or
>
> (c) *with intent* to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of persons,
>
> shall be punished with imprisonment which may extend to two years, or with fine, or with both.
>
> Exception — It does not amount to an offence within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.'

[42] There would therefore appear to be two sets of law that could be resorted to in a similarly circumstanced situation, namely one under the general penal laws where 'intent' had to be proved, and the other alternative avenue being for prosecution being brought for an offence under s 4 (read together with s 3(1)) of Act 15. It was indisputable that an accused in the latter senario under Act 15 would be clearly disadvantaged and in effect discriminated. This in effect would leave open the door for selective prosecution, an anathema or affront to the constitutional right to be dealt with equally and to be also protected equally before the law.

OUR DECISION

[43] For the reasons discussed and elaborated above, we were of the unanimous view that s 3(3) of Act 15 was a disproportionate restriction or measure to meet the permissible objectives spelt out in art 10(2)(a) of the FC. Accordingly, as presently worded and extant on the statute book, s 3(3) of Act 15 was in violation of the constitutional rights of a citizen to be treated equally and also to be protected equally before the law (art 8(1) of the FC).

[44] In our considered assessment, a rebuttable presumption would have

passed the test of proportionality. By such formulation, only the burden would have been shifted to the accused to disprove intent. The courts' role would also have been preserved to ensure that an accused charged with an offence under Act 15 had a fair determination of the case against him, both procedurally and evidentially, as was the case in other criminal proceedings like those under the Dangerous Drugs Act 1952 and the Malaysian Anti-Corruption Commission Act 2009.

CONCLUSION

[45] We would therefore allow the appeal and set aside the decision of the learned High Court judge. We would allow the appellant's prayer (1) in the *saman pemula*. We order that there be the following declaration:

> Section 3(3) of the Sedition Act 1948 (Act 15), contravenes art 10 of the Federal Constitution and therefore is invalid and of no effect in law.

[46] The order of the High Court, including on costs, is hereby set aside. We note that the appellant had not sought for costs in the *saman pemula*. As this appeal was in the nature of a public interest litigation, we are minded not to award any costs.

Appeal allowed; decision of learned High Court judge set aside with no order as to costs.

Reported by Dzulqarnain Ab Fatar